Supreme Court, U. S.
FILED
DEC 11 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-924

ASSOCIATED STUDENTS OF
THE UNIVERSITY OF ARIZONA,
for the benefit of its
members, and JOHN KROMKO,

Petitioners,

vs.

ARIZONA BOARD OF REGENTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS DIVISION TWO

William Joseph Risner
100 N. Stone Ave.
901 Pioneer Plaza
Tucson, Arizona 85701

Counsel for Petitioners

December 6, 1978

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. _____

ASSOCIATED STUDENTS OF
THE UNIVERSITY OF ARIZONA,
for the benefit of its
members, and JOHN KROMKO,

Petitioners,

vs.

ARIZONA BOARD OF REGENTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS
DIVISION TWO

William Joseph Risner
100 N. Stone Ave.
901 Pioneer Plaza
Tucson, Arizona 85701

Counsel for Petitioners

December 6, 1978

I N D E X

	Page
Opinion below	2,A-1
Jurisdiction	2
Questions presented	2
Statutory provisions involved	4
Federal questions presented	5
Statement of the case	6
A. The nature and relation of the litigants	6
B. The source of the instant litigation	7
C. History of the Student Bookstore	7
D. What Regents seek to control is not state funds but the property of ASUA	9
E. The Arizona Court's denial of ASUA's right to seek judicial relief	10
Reasons for Granting the writ	11
1. The decision of the Arizona Courts conflicts with the important constitutional policy of access to the Courts, articulated by this Court in Button and United Transportation.	11
2. The decision of the State Court below is in conflict with the First Amendment's freedom to petition as expressed in United Mine Workers and	

Page

California Motor Transport. 14

3. The judgment of the Arizona Court conflicts with this Court's judgment in Police Department of City of Chicago v. Mosley and thus denies ASUA equal protection of the law. 15

4. Arizona is infringing on rights preserved by the First and Fourteen Amendments in the absence of a compelling state interest.. 17

5. The decision of the Arizona Courts effectively denies ASUA its constitutional right to bring suit against the governing body of that respective school, and is thus in conflict with the decisions of federal circuit courts which provide such a right. 18

6. The Regents exercise of supervision constitutes an unlawful deprivation of property, without due process of law, and the lower courts interpretation of the contract is clearly wrong. 20

Conclusion 24

Appendix A-1

CITATIONS

Cases Page

Associated Stud., U. of Cal. at Riverside v. Attorney General, 368 F. Supp. 11 (1973..... 19

Associated Students of Western Kentucky v. Downing, 475 F. 2d 1132 (1973..... 19

Bates v. City of Little Rock, 361 U.S. 516 (1960)..... 17

Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964)..... 12

Buckley v. Valeo, 424 U.S. 1 (1976)..... 17

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).....13,14,15

Channing Club v. Board of Regents of Texas Tech. Univ., 317 F. Supp. 688 (1970)..... 20

City of Phoenix v. Tanner, 161 P. 2d 923 (1945)..... 20

Cleveland Board of Education v. LaFluer, 414 U.S. 632 (1974)..... 12

Citations - Cont'd

Cases	Page
Consejo Gen. de Estud., etc. v. University of Puerto Rico, 325 F. Supp. 453 (1971)	20
DeJonge v. Oregon, 299 U.S. 353 (1937)	16
First Nat. Bank of Boston v. Bellotti, 98 S. Ct. 1407 (1978)	14
Gay Lib v. University of Missouri, 558 F. 2d 848 (8th Cir. 1977)	20
Gay Students Org. of University of New Hampshire v. Bonner, 509 F. 2d 652 (1st Cir., 1974)	19
Healy v. James, 408 U.S. 169 (1972)	12,20
How v. Fulkerson, 528 P. 2d 853, 22 Ariz. app. 467 (1974)	23
Lake Mich. Col. Fed. of Teach. v. Lake Mich. Com. Col., 518 F. 2d 1091 (6th Cir. 1975)	19
N.A.A.C.P. v. Button, 371 U.S. 415 (1963)	11,13

Citations - Cont'd

Cases	Page
Navajo Tribe v. Arizona Department of Administration, 111 Ariz. 279, 528 P. 2d 623 (1974)	9
New Left Ed. Proj. v. Board of Regents of Tex. Sys., 326 F. Supp. 158 (1970)	20
Police Dept. of City of Chicago v. Mosley, 408 U.S. 92 (1972)	15
Sam Levitz Furniture Co. v. Safeway Stores Inc., 464 P. 2d 612, 105 Ariz. 329 (1970)	20
Shelton v. Tucker, 364 U.S. 479, 487 (1960)	12
Stanley v. Illinois, 405 U.S. 645 (1971)	12
Thomas v. Collins, 323 U.S. 516, 530 (1945)	15
Tinker v. Des Moines Independing Sch. Dist., 393 U.S. 503, 506 (1969)	12
Tyson v. Tyson, 149 P. 2d 674, 61 Ariz. 329 (1944)	23

Citations - Cont'd

Case	Page
UMW v. Coronado Coal Co., 259 U.S. 344 (1922)	18
United Mine W. of A., Dist. 12 v. Illinois State Bar Association, 389 U.S. 217 (1967)	12,14
United States v. O'Brien, 391 U.S. 367 (1967)	16
United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145 (1965)	17
United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971)	12
Wiederhold v. Elgin, Joliet and Eastern Railway Co., 368 F. Supp. 1054 (1974	18
Williams v. Rhodes, 396 U.S. 23 (1968)	16
Wisconsin Student Assn. v. Regents of University of Wisc., 318 F. Supp. 591 (1970)	20

CONSTITUTIONAL PROVISIONS AND STATUTES

Arizona Rules of Civil Procedure, Rule 17(a)	4

Citations - Cont'd

Case	Page
Arizona State Constitution, Article 2, Section 4	4
Federal Rules of Civil Procedure, Rule 17(b)(1)	4,17
United States Constitution, Art. 1 Sec. 10	13
United States Constitution First Amendment	4
United States Constitution Fourteenth Amendment	4
28 U.S.C. § 1257 (3)	2

MISCELLANEOUS

Note, 19 Vanderbilt Law Rev. 984 (1966)	18
Note, 66 Yale Law Journal 712 (1957)	18
Sturges, Unincorporated Association as Parties to Actions, 33 Yale Law Journal, 383 (1924)	18
6 Am Jur. 2d Assoc. & Clubs § 52	17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. _____

ASSOCIATED STUDENTS OF
THE UNIVERSITY OF ARIZONA,
for the benefit of its
members, and JOHN KROMKO,

Petitioners,

vs.

ARIZONA BOARD OF REGENTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS
DIVISION TWO

Petitioners Associated Students of the University of Arizona (ASUA) and John Kromko respectfully pray that a writ of certiorari issue to review the judgment of the Arizona Court of Appeals, Division Two entered in this proceeding on February 7, 1978.

OPINION BELOW

The opinion of the Arizona Court of Appeals, Division Two is officially reported at 584 P. 2d 564 (1978) and appears in the appendix hereto at A-1. The Arizona Supreme Court denied review of this matter. A copy of the judgment rendered in the trial court appears in the appendix hereto at A-16.

JURISDICTION

The Order of the Arizona Supreme Court denying the Petition for Review was entered on September 14, 1978. This petition for certiorari was filed within ninety (90) days of that date. (The opinion of the Arizona Court of Appeals, Division Two was entered on February 7, 1978). The statutory provision which confers jurisdiction on this Court to review the judgment of a state's highest court by writ of certiorari is 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Whether the decision of the Arizona courts conflicts with the important constitutional policy of access of associations to the courts, articulated

by this Court in Button and United Transportation?

2. Whether the decision of the state courts below is in conflict with the First Amendment's Freedom to Petition as expressed in United Mine Workers and California Motor Transport?

3. Whether the Arizona court's judgment conflicts with this Court's decision in Police Department of City of Chicago v. Mosley, and thus denies ASUA equal protection of the law?

4. Whether Arizona is infringing on rights preserved by the First and Fourteenth Amendments in the absence of a compelling state interest?

5. Whether the decision of the Arizona courts, effectively denies ASUA its constitutional right to bring suit against the governing body of the University of Arizona, and is thus in conflict with decisions of several circuit courts which provide such a right?

6. Whether the Regents exercise of control over the bookstore profits constitutes an unlawful deprivation of property without due process of law, and whether the interpretation of the contract by the lower courts is clearly wrong?

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; or deny any person within its jurisdiction the equal protection of the laws."

Section 4 of the Arizona State Constitution reads as follows (Arizona Revised Statutes, Volume 1, at p. 114):

> "No person shall be deprived of life, liberty, or property without due process of law."

Volume 16, Arizona Revised Statute, Rules of Civil Procedure, Rule 17(a) provides at page 272:

> "17(a) Real Party in interest. Every action shall

be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the state so provides, an action for the use of benefit of another shall be brought in the name of the State of Arizona. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

HOW FEDERAL QUESTION PRESENTED

The federal questions involved herein were first raised in a memorandum filed prior to trial in the Superior Court of Arizona. They were again presented to the Superior Court at the time of trial. The federal questions were reiterated in the appellate briefs submitted to the

Arizona Court of Appeals and further discussed in oral argument. The federal questions were again appropriately raised in the Petition for Review filed with the Arizona Supreme Court. The only opinion issued in this case, that by the Arizona Court of Appeals, 584 P. 2d 564 (1978), avoided any discussion of the constitutional issues raised by petitioner.

STATEMENT OF THE CASE

A. The Nature and Relation of the Litigants.

Petitioner, Associated Students of the University of Arizona (hereinafter ASUA) is an unincorporated association established and continually existing since 1914. The association's constitution states that the purpose of the organization is to permit the students at the University of Arizona to "assume the privileges and responsibilities of self-government" and to "control and finance student activities."

Appellant John Kromko was chairperson of the ASUA Appropriations Board at the time this action was filed. The Appropriations Board regulates ASUA finances and appropriates its funds.

Respondent, Arizona Board of Regents

(Regents) is a statutory corporation with jurisdiction and control over the University of Arizona. The Regents recognize ASUA as an organization representing the interests and concerns of students.

B. The Source of the Instant Litigation.

Part 1, Article 7, Sec. 2(c) of the original ASUA constitutition enacted in 1914 provided that "all money of this organization shall be placed in trust with the Business Manager of the University by the Treasurer." On December 2, 1971, the ASUA Appropriations Board requested the Business Office disburse to ASUA $10,000 of the bookstore profits for the fiscal year 1970-71. This request was refused despite the language of Article V, Sec. 1 of the then current ASUA constitution, which provides, "Regardless of the place of deposit, the Appropriation Board shall retain full power of disposition and appropriation over all funds of the Association." It need be noted that the Constitution, including this provision, had been approved by the University administration.

C. History of the Student Bookstore.

From the time it was organized on a cooperative basis in 1915, the Bookstore operated at a loss. At a Board of Regents

meeting on March 8, 1937, on a motion by Regent Albert M. Crawford, it was unanimously decided that

> the matter be referred to President Burgess with the suggestion that he try to work out a plan whereby the student body would purchase the bookstore and operate it, the understanding being that the store would be sold on inventory basis and profits would go to the student body fund.

Through Mr. Crawford, the Regents developed a plan under which ASUA would take over the operation and made an offer to the Student Board of Control (presently known as the Appropriations Board). On October 6, 1937, negotiations for the purchase of the Co-operative Bookstore were completed and ASUA entered into a contract for sale with the Regents. A copy of the contract appears in the appendix at A-18.

Since 1937 the Appropriations Board (or its predecessor, the Board of Control) have distributed bookstore profits to various student activities. The building in which the store is housed has been paid for by ASUA through store profits. Over the years, the Board has modified the store's accounting practices and security

plans, has adjusted the contract of the store's manager, and increased the percentage of the profits directed to its budget.

In compliance with its bookkeeping responsibilities under the contract, the University Business Office properly kept and disbursed Bookstore money until December 2, 1971. On that date, the Office failed to honor an Appropriations Board request that $10,000 of Bookstore profits be disbursed for the 1970-71 fiscal year.

D. What the Regents Seek to Control is not State Funds but Property of ASUA.

In Navajo Tribe v. Arizona Department of Administration, 111 Ariz. 279, 528 P. 2d 623 (1974) the Arizona Supreme Court recognized the parameters of the term public funds:

> "Only monies raised by the operation of some general law become public funds .... Custodial Funds are not state monies .... The term 'public funds' refers to funds belonging to the state and does not apply to funds for the benefit of contributors for which the state is a mere custodian or conduit ...."

The present bookstore profits are not state funds. They can be directly traced to sources independent of state or public monies: an enforceable contract of sale

transferring ownerhsip of the store to ASUA. None of this money was directly derived from fee money, state funds, or the operation of any general law, but rather, was obtained from work and sources independent of the University administration.

E. The Arizona Courts have Improperly Denied ASUA the Right to Seek Judicial Relief.

Since their initial answer filed February 8, 1972, the Regents have asserted that ASUA is not a juridical entity and therefore could not bring suit in the courts of Arizona. This position is premised on the common law notion that an unincorporated association may not sue or be sued.

On December 22, 1975, the Arizona Superior Court held that ASUA had standing and could bring suit, but further decided that the Regents could exercise supervision over the funds expended from the operation of the bookstore. ASUA appealed this latter judgment and the Regents cross-appealed as to ASUA's capacity to bring suit. On February 7, 1978, the Arizona Court of Appeals determined that ASU.. was not a juridicial entity and could therefore not sue in the

courts of Arizona. Although the Court's decision left but one capable party in the litigation, it ignored the case and controversy requirement and sustained the lower court's ruling as to the Regents' ability to monitor the disposition of Bookstore profits. The Arizona Supreme Court denied the Petition for Review on September 14, 1978 and thereby left standing a lower court decision which bars ASUA and all other unincorporated associations from access to the courts.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE ARIZONA COURTS CONFLICT WITH THE IMPORTANT CONSTITUTIONAL POLICY OF ACCESS OF ASSOCIATIONS TO THE COURTS, ARTICULATED BY THIS COURT IN BUTTON AND UNITED TRANSPORTATION.

The decision of the Arizona courts barring ASUA from litigating in the courts of the state, impermissibly impinges upon the right of ASUA and its members to freely exercise their right of association and expression. The decision is in conflict with a long line of decisions of this Court protecting and encouraging the development of group legal action. This policy was germinated in N.A.A.C.P. v. Button, 371 U.S.

415 (1963), developed with the holdings in Brotherhood of Railroad Trainmen v. Virginia, 337 U.S. 1 (1964), United Mine W. of A., Dist. 12 v. Illinois State Bar Association, 389 U.S. 217 (1967), and flowered in United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971), where collective activity undertaken to obtain meaningful access to the courts was held to be a fundamental right within the protection of the First Amendment.

ASUA is an association entitled to the benefits and protection of the First Amendment. While Petitioner is cognizant that First Amendment rights must always be applied "in light of the special characteristics of the ... environment in the particular case", Tinker v. Des Moines Independent Com. Sch. Dist., 393 U.S. 503, 506 (1969), this court has repeatedly recognized that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Shelton v. Tucker, 364 U.S. 479, 487 (1960); Stanley v. Illinois, 405 US. 645 (1971); Cleveland Board of Education v. LaFluer, 414 U.S. 632 (1974).

The decision in Healy v. James, 408 U.S. 169 (1972) signifies the applicability

of associational freedoms to a group like ASUA. Therein this Court recognized that a campus chapter of the Students for a Democratic Society enjoyed associational liberties guaranteed by the First Amendment. Logically, ASUA, an association representing a much larger group of students and one which is recognized as the official organ of student sentiment, should enjoy similar protection and liberties.

Furthermore, the association was engaged in activities which are constitutionally protected. Initially they became party to a contract with legal objectives, behavior within the purview of the Contract Clause. United States Constitution, Art. 1 Sec. 10; California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

Subsequently, they sought vindication in the courts. This court recognized in Button, 371 U.S., at 429, that litigation by an association is a form of expression and is consequently protected against governmental instrusions, by the First Amendment. The protection of associational activity in the Courts is not limited by its purpose, but extends to litigation, like that here, dealing with

purely commercial interests. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

ASUA is being denied a fundamental right protected by the First Amendment. A writ of certiorari should issue to determine whether the State, in relying on the common law adage that an unincorporated association cannot sue or be sued, has shown that a "subordinating interest is compelling." First Nat. Bank of Boston v. Bellotti, 98 S. Ct. 1407 (1978).

2. THE DECISION OF THE STATE COURT BELOW IS IN CONFLICT WITH THE FIRST AMENDMENT'S FREEDOM TO PETITION AS EXPRESSED IN UNITED MINE WORKERS AND CALIFORNIA MOTOR TRANSPORT.

In deciding that ASUA could not bring suit in its courts, Arizona has unconstitutionally infringed upon the right of ASUA to petition the government for a redress of grievances.

The right to petition is explicitly mentioned in the First Amendment, and "is one of the most precious of the liberties guarded by the Bill of Rights." United Mine W. of A., Dist. 12 v. Illinois State Bar Association, 389 U.S. 217, 222 (1967). The right to petition extends to all

branches of government, making access to the courts one aspect of the right to petition. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). Though this right is inseparably connected with the other First Amendment rights, such as the right to association as discussed above, it is not identical. Thomas v. Collins, 323 U.S. 516, 530 (1945).

3. THE JUDGMENT OF THE ARIZONA COURT CONFLICTS WITH THIS COURT'S JUDGMENT IN POLICE DEPARTMENT OF CITY OF CHICAGO v. MOSELY AND THUS DENIES ASUA EQUAL PROTECTION OF THE LAW.

In Police Dept. of City of Chicago v. Mosley, 408 U.S. 92 (1972), this Court found that a classification, which denied access to a public forum because of the context of a group's expression, constituted a denial of equal protection. Similarly, Arizona Rules of Civil Procedure 17(a) is a denial of equal protection as it denies a group access to a vital public forum, the courts, solely on whether or not the group has incorporated.

Because Arizona treats some groups differently than others, Rule 17(a) must be analyzed in terms of the Equal Protection Clause of the Fourteenth Amendment.

Id., at 94. As in all equal protection cases, the crucial determination is whether there is "an appropriate governmental interest suitably furthered by the differential treatment." Id., at 95. There may be sufficient regulatory interests for conditioning access to the State's judiciary, but because the rule's classification implicates conduct within the protection of the First Amendment, DeJonge v. Oregon, 299 U.S. 353 (1937), the Equal Protection Caluse requires the statute be narrowly tailored to its legitimate objectives. Williams v. Rhodes, 393 U.S. 23 (1968).

Arizona predicates this distinction on the wisdom of the common law, tnougn much of this wisdom is wholly inappropriate in a constitutional setting. Because the Rule's differentiation is based on anachronic notions of incorporation, the Arizona Rule of Procedure as applied to ASUA imposes a selective restriction on expressive conduct far broader than is essential to the government interest. United States v. O'Brien, 391 U.S. 367 (1967). Consequently, the Rule is infirm for the additional reason that it offends the Equal Protection Clause of the Fourteenth Amendment.

4. ARIZONA IS INFRINGING UPON RIGHTS PRESERVED BY THE FIRST AND FOURTEENTH AMENDMENTS IN THE ABSENCE OF A COMPELLING STATE INTEREST.

It is axiomatic that state action which may have the effect of curtailing First Amendment privileges is subject to the closest scrutiny. Buckley v. Valeo, 424 U.S. 1, 44-45, (1976). To withstand such scrutiny, the state must show an interest which is compelling, Bates v. City of Little Rock, 361 U.S. 516, 524 (1960), and that the means employed in furtherance of that interest are closely drawn to avoid abridgement of fundamental rights. Buckley, 424 U.S., at 25.

As evidenced by either legislative or judical changes in most codes including the Federal Rules of Civil Procedure, the majority rule now allows unincorporated associations to sue or be sued. 6 Am Jur. 2d Assoc. & Clubs § 52., Federal Rules of Civil Procedure, Rule 17(b)(1). This trend is based on this Court's perception that unincorporated associations do not really differ functionally from corporations, United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145, 149-50 (1965), and that the reasons for the dis-

parate treatment under the common law are no longer pertinent. UMW v. Coronado Coal Co., 259 U.S. 344, 385-89 (1922). The trend toward viewing unincorporated associations as juridical entities has been unanimously supported by the scholars. Sturges, Unincorporated Associations as Parties to Actions, 33 Yale Law Journal, 383 (1924); Note, 19 Vanderbilt Law Rev. 984 (1966); Note, 66 Yale Law Journal 712 (1957).

The common law rule that denies legal capacity to an unincorporated association is no longer viable and can therefore not provide the basis for a rule which impinges on First Amendment liberties. "A federally created right should not be vitiated by an outdated, much criticized anachronism of the common law." Wiederhold v. Elgin, Joliet and Eastern Railway Co., 368 F. Supp. 1054, 1066 (1974).

5. THE DECISION OF THE ARIZONA COURTS EFFECTIVELY DENIES ASUA ITS CONSTITUTIONAL RIGHT TO BRING SUIT AGAINST THE GOVERNING BODY OF THAT RESPECTIVE SCHOOL, AND IS THUS IN CONFLICT WITH THE DECISIONS OF SEVERAL CIRCUIT COURTS WHICH PROVIDE SUCH A RIGHT.

In 1973 a United States District Court

over the objections of the University Regents, held that the Associated Students of the University of California at Riverside were a distinct legal entity, separate and apart from the University, and consequently they had the legal capacity to bring suit. Associated Stud., U. of Cal. at Riverside v. Attorney Gen., 368 F. Supp. 11 (1973).

The Sixth Circuit in 1973 entertained a suit brought by the Associated Students of the University of Western Kentucky against the University's Board of Regents. The matter, like the one subjudice, involved a First Amendment claim. Associated Students of Western Kentucky v. Downing, 475 F. 2d 1132 (1973). Similarly, the First Circuit allowed an officially recognized student organization to sue the University President and the State's Governor, in their roles as officials of the University. Gay Students Org. of Univ. of New Hampshire v. Bonner, 509 F. 2d 652 (1st Cir., 1974).

In a case which eventually progressed to the Sixth Circuit, a teacher's group had the capacity to bring an action against the school which employed them. Lake Mich. Col. Fed. of Teach. v. Lake Mich.

Com. Col., 518 F. 2d 1091 (Sixth Cir. 1975). In a suit similar to Healy v. James, supra, the Board of Curators was sued and lost on the issue of official recognition by a campus organization. Gay Lib v. University of Missouri, 558 F. 2d 848 (Eighth Cir. 1977). For cases reaching similar conclusions at the District Court level, see: Wisconsin Student Ass'n. v. Regents of University of Wis., 318 F. Supp. 591 (1970); New Left Ed. Proj. v. Board of Regents of U. of Tex. Sys., 326 F. Supp. 158 (1970); Consejo Gen. de Estud's, etc. v. University of Puerto Rico, 325 F. Supp. 453 (1971); Channing Club v. Board of Regents of Texas Tech Univ., 317 F. Supp. 688 (1970).

The decision below denies ASUA the opportunity to bring suit against the Regents of the University. In light of the unanimity with which the Federal Courts have answered this question laddened with Constitutional issues, a writ of certiorari should issue to allow scrutiny of the Arizona Courts' handling of this question.

6. THE REGENTS EXERCISE OF SUPERVISION CONSTITUTES AN UNLAWFUL DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW, AND THE

LOWER COURTS' INTERPRETATION OF THE CONTRACT IS CLEARLY WRONG.

The Regents, by exerting control over the disposition of the Bookstore profits, have violated ASUA's right not to be deprived of its property without due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution, as well as by Section Four of the Arizona State Constitution.

As found by the trial court, the Agreement for Sale dated October 6, 1937, is a valid contract. (See contract at A-18 .) It is the product of a considered decision on the part of the Regents to sell the bookstore and ASUA to purchase the bookstore.

It is ASUA's contention that the contract is unambiguous, and under Arizona law is not properly subject to judicial interpretation. City of Phoenix v. Tanner, 161 P. 2d 923, 63 Ariz. 278 (1945); Sam Levitz Furniture Str. v. Safeway Stores Inc., 464 P. 2d 612, 105 Ariz. 329 (1970). The contract is explicitly entitled "Agreement for Sale of Cooperative Bookstore to the Associated Students." ASUA was obligated to pay the University some $21,442.57 as consideration in return for "the management and operation of the Cooperative Bookstore." The written agreement expressly provides that ASUA will pay the amounts set forth in the agremenet as installments "in addition to any net profit in excess of the amount guaranteed until the agreed price of $22,442.57 has been paid." For the Regents to assert that they also get to keep the profits after the agreed price has been paid defies good sense; for a court to so interpret the contract is clearly wrong.

In accordance with the terms of the contract and elementary concepts of ownership, the ASUA Board of Control and its successor the Appropriations Board have exercised full control of the bookstore profits since their accrual. There is no recorded instance prior to the events leading up the present case where the Administration or the Regents successfully ursurped this control.

Although neither the instrument nor the parties performance indicate any ambiguity as to their original intentions, the Regents suggest there is uncertainty in the contract, and they ask that it be resolved so that a party which forty years ago sold a property, now be able to dictate how the purchaser may enjoy its fruits.

But Arizona law has long favored an interpretation of a contract which gives a reasonable and fair meaning to all manifestations of intentions, as opposed to an interpretation which is unreasonable or unfair. Tyson v. Tyson, 149 P. 2d 674, 61 Ariz. 329 (1944). Furthermore, the Regents are heard to suggest such an interpretation to a contract that was drafted by their counsel and agreed to by a party without the aid of an attorney, despite the fact that in Arizona, an instrument is to be construed against the drafting party. How v. Fulkerson, 528 P. 2d 853, 22 Ariz. App. 467 (1974).

Finally, ASUA offers a motion from a Board of Regents meeting, presented by Regent Albert M. Crawford, who ultimately handled the negotiations for the transfer of the Bookstore. At the meeting of March 8, 1937, it was unanimously decided that:

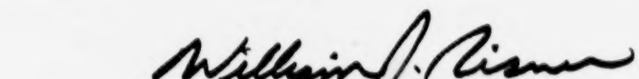
> "the matter be referred to President Burgess with the suggestion that he try to work out a plan whereby the student body would purchase the bookstore and operate it, the understanding being that the store would be sold on inventory basis and profits would go to the student body fund."

The statements of the parties before the sale, the instrument of sale, the performance of the parties since the sale, and Arizona law on contracts suggest that ASUA has the sole right to determine how Bookstore profits are to be disbursed. A decision of the Arizona courts to the contrary mandates the issuance of a writ of certiorari to allow scrutiny of such a conclusion.

C O N C L U S I O N

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Arizona Court of Appeals, Division Two.

RESPECTFULLY SUBMITTED,



William Joseph Risner
901, Pioneer Plaza Bldg.
100 N. Stone Ave.
Tucson, Arizona 85701
(602) 623-3436

Counsel for Petitioner

December 6, 1978

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

_____

NO. _____

_____

ASSOCIATED STUDENTS OF
THE UNIVERSITY OF ARIZONA,
for the benefit of its
members, and JOHN KROMKO,

Petitioners.

vs.

ARIZONA BOARD OF REGENTS,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 1978, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Hon. John La Sota, Jr., Attorney General, 200 State Capitol Building, Phoenix, Arizona 85007, attn: David W. Ronald, Counsel for Respondent. I further certify that all parties required to be served have been served.

William Joseph Risner
100 N. Stone Ave.
901 Pioneer Plaza
Tucson, Arizona 85701

Counsel for Petitioners

A P P E N D I X

	Page
Opinion of Arizona Court of Appeals, Division Two	A-1
Order of Arizona Supreme Court denying Petition for Review	A-15
Judgment of the trial court	A-16
Agreement for Sale of Cooperative Bookstore to The Associated Students	A-18

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ASSOCIATED STUDENTS OF THE UNIVERSITY OF ARIZONA, for the benefit of its members, and JOHN KROMKO,

Appellants and Cross-Appellees,

vs.

ARIZONA BOARD OF REGENTS,

Appellee and Cross-Appellant.

2 CA-CIV 2384

OPINION

APPEAL FROM THE SUPERIOR COURT
OF PIMA COUNTY

Cause No. 131336

Honorable Norman S. Fenton, Judge

AFFIRMED

Risner, Raven & Keller
By William J. Risner — Tucson

Attorneys for Appellants
and Cross-Appellees

Bruce E. Babbitt, The Attorney General
by David W. Ronald, Assistant Attorney General — Phoenix

Attorneys for Appellee
and Cross-Appellant

This appeal is from a judgment denying Associated Students of the University of Arizona (hereinafter referred to as ASUA) any money on its complaint and granting to the Arizona Board of Regents the right to maintain and exercise supervision over all funds produced through the operation of the bookstores at the University of Arizona. ASUA, as an unincorporated association for the benefit of its members, and John Kromko, then the Chairman of the ASUA Appropriations Board, brought suit against the Board of Regents, an independent body corporate which has jurisdiction and control over the University of Arizona, after a request to the University Business Office that it disburse to ASUA $10,000 in bookstore profits from 1970-71 was refused. ASUA consists of all students who are registered at the University of Arizona. The Appropriations Board, which regulates ASUA's finances and appropriates its funds, intended to deposit this money in an account not under the control of the University administration.

In its complaint, ASUA, alleging ownership of the bookstore and its profits by virtue of an "Agreement for Sale of Cooperative Bookstore to the Associated

Students" entered into between it and the Board of Regents in 1937, sought the $10,000 it had previously been refused. The agreement provided that management and operation of the bookstore and its inventory were transferred to ASUA for approximately $21,500 to be paid in specified yearly installments. It was signed for the Board of Regents by its President and Secretary and for ASUA by its Graduate Manager, whose duties were to furnish continuity to ASUA and to supervise and manage its business affairs. At this time, the Board of Control (now the Appropriations Board) consisted of the Graduate Manager, a faculty member, an alumnus, the director of athletics and three students.

The Board of Regents, in its answer to the complaint, alleged that ASUA lacked standing or capacity to sue or enter into a contract. On cross-appeal, it challenges the trial court's finding that ASUA has standing and can sue and its judgment declaring the 1937 agreement between ASUA and the Board of Regents to be valid.

We first address the issue raised by the Board of Regents as to ASUA's capa-

city to sue and agree that it lacked capacity under Rule 17(a), Arizona Rules of Civil Procedure, 16 A.R.S., to bring this suit.

It was a maxim of the common law that an unincorporated association could not be a party to litigation. "The well-established rule is that in the absence of an enabling or permissive statute or rule of practice, an unincorporated association, society, or club cannot sue or be sued in the organization's own name. The reason is that such an association ... in the absence of statutes recognizing it, has not legal entity distinct from that of its members." 6 Am.Jur.2d, Associations and Clubs,

Thus, unless authorized by an Arizona statute, ASUA, as an unincorporated association, has no capacity to sue the Board of Regents. Moffat Tunnel League et al. v. United States et al., 289 U.S. 113, 53 S.Ct. 543, 77 L. Ed. 1067 (1933). An express statutory provision, however, is not indispensable to an association's capacity to sue and be sued in the association's name. A suit may be maintained by virtue of necessary implication from statutory provisions which recognize an unincorporated association as

a legal entity, but do not specifically authorize it to sue or be sued. United Mine Workers of America et al. v. Coronado Coal Co. et al., 259 U.S. 344, 42 S.Ct. 570, 66 L. Ed. 975 (1922); Jardine v. Superior Court In and for Los Angeles County et al., 213 Cal. 301, 2 P. 2d 756 (1931).

ASUA argues that its capacity to sue in its common name arises by necessary implication from the Arizona Constitution art. 14, § 1, Arizona statutes, A.R.S. §§ 44-2208(28) and 1-215(24), and Rules 4(d)(6), and 18(a), Arizona Rules of Civil Procedure, 16 A.R.S. We cannot agree with this interpretation of Arizona law. Simply because an association is included as a person under A.R.S. § 1-215(24), for example, does not establish it as a legal entity capable of suing or being sued in its own right. See Dolph v. Cortez, 8 Ariz.App. 429, 446 P. 2d 939 (1968).

The common law, except as modified by statute or unsuited to our local system or condition, is still in force in Arizona. McClure v. Johnson, 50 Ariz. 76, 69 P. 2d 573 (1937); A.R.S. § 1-201. "Where a statute revises the common law and is clearly designed as a substitute therefor,

the common law is repealed. However, statutes are not deemed to repeal the common law by implication unless the legislative intent to do so is clearly manifested." Tucson Gas & Electric Company v. Schantz, 5 Ariz.App. 511 at 515, 428 P. 2d 686 at 690 (1967).

If the State of Arizona wishes to grant unincorporated associations legal status, it may do so by the appropriate legislation. However, until the legislative intent to do so is clearly manifested, the privilege must be denied. ASUA was therefore not a proper plaintiff in this action, and since Kromko's rights can be no greater than the group he represents, he also lacked capacity to maintain this suit.

ASUA urges that principles of equity and fairness dictate that the Board of Regents should not now be permitted to raise the defense that ASUA has no legal status to sue or contract. One who deals with an association as a legal entity capable of transacting business and who thus receives money or value from that association, is estopped from denying the legality of its existence or right to contract.

State Farm Mut. Automobile Ins. Co. v. Mackenchnie, 114 F. 2d 728 (8th Cir. 1940).

Assuming argumendo that the Board of Regents did deal with ASUA as a legal entity, it is not now estopped from denying ASUA's capacity to sue. The Board of Regents is a state agency. City of Tempe v. Arizona Board of Regents, 11 Ariz. App. 24, 461 P.2d 503 (1969). In Arizona, as a general rule, estoppel in pais will not operate against the state or its agencies. O'Connor v. Industrial Commission, 19 Ariz. App. 43, 504 P. 2d 966 (1972); Maricopa County v. Cities & Towns of Avondale et al., Wickenburg, 12 Ariz.App. 109, 467 P. 2d 949 *1970).

If the issue of ASUA's capacity to sue were resolved in its favor, however, it would still not prvail on appeal. The trial court was confronted with conflicting interpretations of the various provisions of the 1937 agreement. Relevant provisions are:

> "That whereas the Associated Students of the University of Arizona desire to operate the Cooperative Bookstore under their own management, the Board of Regents of the University of Arizona agree to transfer over to the Associated Students of the Uni-

versity the management and operation of the Cooperative Bookstore, together with the merchandise, caps and gowns, and furniture and fixtures under the following conditions:

* * *

The Board of Regents of the University agree to furnish space on the University campus for the Cooperative bookstore without charge.

* * *

It is further agreed that all collections, disbursements, and accounts will be kept by the Business Office of the University. The Board of Regents reserves the right to surpervise, approve, or disapprove any policies in connection with the operation of the Cooperative Bookstore."

At the time the agreement was executed the bookstore had not been making any profit. ASUA argues that the contract itself as well as the circumstances unambiguously constitute an unlimited sale of property. In support of its position it points to the title, "Agreement for Sale of Cooperative Bookstore to the Associated Students" and to the recital of purpose which states that "the management and operation" of the bookstore is to be transferred. It characterizes the agreement by

which the bookstore accounts are housed by the University Business Office as custodial and interpretes the reservation clause as merely empowering the Board of Regents to intervene in bookstore policy if it endangers the health, safety and well-being of the University at large. By this agreement, ASUA contends, it could only have intended to purchase the profits of its business, and the trial court's determination that the Board of Regents could exercise supervision over these profits constitutes an unlawful deprivation of property without due process of law.

The Board of Regents argues that the agreement unambiguously establishes its intent to retain final authority over bookstore matters, including the disposition of bookstore revenue. It emphasizes the board reservation clause by which it has the right to supervise "any policies in connection with the operation" of the bookstore and interprets the requirement that accounts be kept by the University Business Office as allowing the Comptroller-Treasurer to oversee the financial affairs of the bookstore.

Though believing the agreement's language to be unambiguous, the Board of

Regents introduced evidence concerning the construction given to the contract by the parties since the time of its execution. In order to determine the intent of the parties, the court examined several volumes of documental evidence in addition to hearing the testimony of witnesses.

The judgment of the trial court was that "...the Arizona Board of Regents of the University of Arizona, acting through its authorized personnel at the University of Arizona, have the right to maintain and exercise supervision over all funds produced through the operation of the bookstores at the University of Arizona as practiced by the parties since 1937." (Emphasis ours) Thus it is apparent from this judgment that the court felt the terms of the agreement were ambiguous and that it considered the conduct of the parties since 1937. ASUA contends that the court erred in its interpretation of the contract.

The initial determination of whether an agreement is ambiguous, and thus subject to interpretation through the use of parol evidence, is a question of law to be determined by the court. Slater v. Westland, 27 Ariz. App. 227, 553 P. 2d 1212

(1976). An appellate court is not bound by the trial court's conclusions of law. The interpretation of an instrument is a question of law to be determined by this court independently. Polk v. Koerner, 111 Ariz. 493, 533 P. 2d 660 (1975); Dutch Inns of America, Inc. v. Horizon Corporation, 18 Ariz. App. 116, 500 P. 2d 901 (1972).

The mere fact that parties to an instrument disagree as to its meaning does not establish its ambiguity. Language is ambiguous when it can reasonably be construed in more than one sense and such construction cannot be determined within the four corners of the instrument. University Realty & Development Company v. Omid-Gaf, Inc., 19 Ariz. App. 448, 508 P. 2d 747 (1973).

We find the agreement for sale to be ambiguous. The character of a contract must be determined by its provisions rather than its label. Kintner v. Wolfe, 102 Ariz. 164, 426 P. 2d 798 (1967). This contract does not, considered as a whole, clearly and unambiguously set forth the rights of the parties. It is not so worded that it can be given a certain definite legal meaning or interpretation.

Richards Development Company v. Sligh, 89 Ariz. 100, 358 P. 2d 329 (1961). By examining its provisions, we cannot ascertain whether a transfer of bookstore management and operation to ASUA also included an unrestricted transfer of the right to and control of bookstore profits.

Once a contract is determined to be ambiguous, extrinsic evidence may be resorted to for the purpose of ascertaining its real meaning. Crone v. Amado, 69 Ariz. 389, 214 P. 2d 518 (1950). The court will adopt a construction given to a contract by the parties themselves unless such construction does violence to the express terms of the writing, especially where such interpretation has extended over a long period of time. Crone v. Amado, supra; Rio Grande Oil Company v. Upton Oil Company, 33 Ariz. 474, 266 P. 3 (1928); Pendleton v. Brown, 25 Ariz. 604, 221 P. 213 (1923). The acts of parties under a contract, before disputes arise, are the best evidence of the meaning of doubtful contractual terms. Brown et al. v. Cowden Livestock Co., 187 F. 2d 1015 (9th Cir. 1951).

A determination of the surrounding facts, consideration of which is necessary

to resolve ambiguities, is for the trier of fact. Where evidence is conflicting, a reviewing court will not substitute its opinion for that of the trial court. Evidence will be viewed most favorably to the appellee and in support of the result of the trial court, and when there is any reasonable evidence to support it, the judgment will not be disturbed on appeal. Holaway v. Realty Associates, 90 Ariz. 289, 367 P. 2d 643 (1961).

We have reviewed the record and there was reasonable evidence to support the trial court's determination that over the years the Board of Regents had consistently maintained supervision and ultimate control over bookstore operations, including disbursal of profits. The 1937 agreement thus conveyed only a limited property right to ASUA. It provided a source of funds, but subject to the Board of Regents' control. We find no deprivation of property without due process of law.

Affirmed.

JAMES D. HATHAWAY, Judge

CONCURRING:

LAWRENCE HOWARD, Judge

J. RICHARD HANNAH, Judge of
the Superior Court

NOTE: Chief Judge James L. Richmond, having requested that he be relieved from consideration of this matter, Judge J. Richard Hannah was called to sit in his stead and participate in the determination of this decision.

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

ASSOCIATED STUDENTS OF THE UNIVERSITY OF ARIZONA, for the benefit of its members, and JOHN KROMKO, Appellants and Cross-Appellees, v. ARIZONA BOARD OF REGENTS, Appellee and Cross-Appellant.	Supreme Court No. 13727-PR Court of Appeals No. 2 CA-CIV 2384 Pima County No. 131336

IT IS ORDERED: Vacating the Order Granting Petition for Review in the above-entitled cause dated May 2, 1978.

FURTHER ORDERED: Petition for Review = Denied.

DATED this 14th day of September, 1978.

JAMES DUKE CAMERON
Chief Justice

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

ASSOCIATED STUDENTS OF THE UNIVERSITY OF ARIZONA, etc., et al., Plaintiffs,	)	No. 131336
vs.	)	JUDGMENT
ARIZONA BOARD OF REGENTS, Defendant.	)	

The above-captioned matter having come on regulary for trial, the Court having heard testimony, reviewed all exhibits, having studied memorandums submitted, and having heard oral arguments;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That the contract between the Arizona Board of Regents of the University of Arizona and the Associated Students of the University of Arizona dated October 6, 1937 is valid.

2. That the Arizona Board of Regents of the University of Arizona, acting through its authorized personnel at the University of Arizona, have the right to maintain and exercise supervision over all funds produced through the operation of

the bookstores at the University of Arizona as practiced by the parties since 1937.

3. That the defendant, Arizona Board of Regents, has Judgment on plaintiffs' Complaint in that defendant is not required to pay any sums of money to plaintiffs under plaintiff's Complaint.

4. That each party is to bear its own costs.

DATED this 1st day of July, 1976.

The Honorable Norman Fenton
Judge of the Superior Court

Copy mailed this 22nd day
of April, 1976, to:

William J. Risner, Esq.
915 Transamerica Building
Tucson, AZ 85701
Attorney for Plaintiffs

AGREEMENT FOR SALE OF
COOPERATIVE BOOKSTORE TO
THE ASSOCIATED STUDENTS

THIS AGREEMENT made and entered into this 6th day of October, 1937 by and between the BOARD OF REGENTS OF THE UNIVERSITY OF ARIZONA and the ASSOCIATED STUDENTS OF THE UNIVERSITY OF ARIZONA

WITNESSETH:

That whereas the Associated Students of the University of Arizona desire to operate the Cooperative Bookstore under their own management, the Board of Regents of the University of Arizona agree to transfer over to the Associated Students of the University the management and operation of the Cooperative Bookstore, together with the merchandise, caps and gowns, and furniture and fixtures under the following conditions:

The associated Students agree to pay to the University of Arizona the sum of Twenty-one thousand four hundred forty-two and 57/100 dollars ($21,442.57) for the merchandise, caps and gowns, and furniture and fixtures as inventoried on June 30, 1937, together with all accounts receivable and payable, and all credits receivable.

It is further agreed that the Associated Students will pay to the University of Arizona on or before June 30, 1937, together with all accounts recievable and payable, and all credits receivable.

It is further agreed that the Associated Students will pay to the University of Arizona on or before June 30 of each fiscal year the following amounts in addition to any net profit in excess of the amount guaranteed until the total agreed price of $21,442.57 has been paid.

Year 1937-38	$3,042.57
1938-39	3,400.00
1939-40	1,000.00
1940-41	2,000.00
1941-42	2,000.00
1942-43	2,000.00
1943-44	2,000.00
1944-45	2,000.00
1945-46	2,000.00
1946-47	2,000.00

The Board of Regents of the University agree to furnish space on the University campus for the Cooperative bookstore without charge.

It is further agreed that the Board of Regents of the University will pay the salaries of the Manager of the Cooperative

Bookstore and his assistant beginning on October 1, 1937, until such time as $4,942.57 shall have been paid.

It is further agreed that all collections, disbursements, and accounts will be kept by the Business Office of the University.

The Board of Regents reserves the right to supervise, approve, or disapprove any policies in connection with the operation of the Cooperative Bookstore.

It is mutually agreed that the effective date of this transfer shall be July 1, 1937.

THE BOARD OF REGENTS OF
THE UNIVERSITY OF ARIZONA

By_____
President

By_____
Secretary

ASSOCIATED STUDENTS OF
THE UNIVERSITY OF ARIZONA

By_____
Graduate Manager

Supreme Court, U. S.
FILED
JAN 9 1979
K, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-924

ASSOCIATED STUDENTS OF
THE UNIVERSITY OF ARIZONA,
for the benefit of its
members, and JOHN KROMKO,
Petitioners,
v.
ARIZONA BOARD OF REGENTS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General

DAVID W. RONALD
Assistant Attorney General
200 State Capitol
Phoenix, Arizona 85007
Attorneys for Respondent

January 5, 1979

INDEX

Page

Questions Presented iv

Statement of the Case 1

Argument 2

I. Whether the Decision of the Arizona Courts to Follow the Common-Law Maxim Denying an Unincorporated Association the Capacity to Sue Constitutes an Impermissible Infringement on Rights Protected by the First and Fourteenth Amendments 2

II. Whether the Decision of the Arizona Courts Conflicts with Any Circuit Court Decisions 4

III. Whether the Regents' Exercise of Supervision Constitutes an Unlawful Deprivation of Property Without Due Process of Law, and the Lower Court's Interpretation of the Contract is Clearly Wrong 5

Conclusion 7

TABLE OF CASES AND AUTHORITIES

Cases	*Page*
Brown v. Cowden Livestock Co. 187 F.2d 1015, 1019 (9th Cir., 1951)	6
Crone v. Amado 69 Ariz. 389, 397 214 P.2d 518, 520 (1950)	6
Holaway v. Realty Associates 90 Ariz. 289, 292 367 P.2d 643, 646 (1962)	7
Moffat Tunnel League v. United States 289 U.S. 113 (1933)	3, 7
NAACP v. Button 371 U.S. 415 (1963)	3
Pendelton v. Brown 26 Ariz. 604, 625 321 P. 213 (1923)	6
Police Department of City of Chicago v. Mosley 408 U.S. 92 (1972)	3
Rio Grande Oil v. Upton Oil Co. 33 Ariz. 474 266 P.3 (1928)	6
United Transportation Union v. State Board of Michigan 401 U.S. 576 (1971)	3

Authorities	*Page*
Arizona Rules of Civil Procedure Rule 23.2	3
ASUA Constitution Article 2	4
Corbin on Contracts § 558	6
Federal Rules of Civil Procedure Rule 17(b)	4, 5, 8

QUESTIONS PRESENTED

I. WHETHER THE DECISION OF THE ARIZONA COURTS TO FOLLOW THE COMMON-LAW MAXIM DENYING AN UNINCORPORATED ASSOCIATION THE CAPACITY TO SUE CONSTITUTES AN IMPERMISSIBLE INFRINGEMENT ON RIGHTS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS.

II. WHETHER THE DECISION OF THE ARIZONA COURTS CONFLICTS WITH ANY CIRCUIT COURT DECISIONS.

III. WHETHER THE REGENTS' EXERCISE OF SUPERVISION CONSTITUTES AN UNLAWFUL DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW, AND THE LOWER COURT'S INTERPRETATION OF THE CONTRACT IS CLEARLY WRONG.

STATEMENT OF THE CASE

The following statement of the case is intended to be a supplement to the statement of the case previously submitted by Petitioner in this matter.

The principal dispute between the parties in this matter arises over the interpretation of conflicting clauses of the "Agreement for Sale of Cooperative Bookstore to the Associated Students". (See copy of contract attached in Petitioner's Appendix at *A-18.*) In that agreement it is provided that ". . . all collections, disbursements, and accounts will be kept by the Business Office of the University." Further, "The Board of Regents reserves the right to supervise, approve, or disapprove any policies in connection with the operation of the Cooperative Bookstore." At the same time as stated in the Agreement, the Associated Students agreed to pay approximately $22,000 for ". . . the management and operation of the Cooperative Bookstore . . .".

In its opinion the Arizona Court of Appeals determined that the Agreement for Sale referenced above was ambiguous, and that it did not, when considered as a whole, clearly and unambiguously set forth the rights of the parties. The Court further held that the agreement was not so worded that it could be given a certain or definite legal meaning or interpretation and that the Court could not ascertain by examining its provisions whether a transfer of bookstore management and operation to Associated Students of the University of Arizona also included an unrestricted transfer of the right to and control of bookstore profits. The Court went on to say that once a contract is determined to be ambiguous, extrinsic evidence may

be resorted to for the purpose of ascertaining its real meaning. The Court of Appeals then said that a determination of the surrounding facts, consideration of which is necessary to resolve ambiguities, is for the trier of fact and that where evidence is conflicting a reviewing court will not substitute its opinion for that of the trial court. The court then concluded that based upon the record there was reasonable evidence to support the trial court's determination that over the years the Board of Regents had consistently maintained supervision and ultimate control over bookstore operations, including disbursal of profits. The 1937 agreement thus conveyed only a limited property right to ASUA. It provided a source of funds, but subject to the Board of Regents' control, and found no deprivation of property without due process of law.

ARGUMENT

I

WHETHER THE DECISION OF THE ARIZONA COURTS TO FOLLOW THE COMMON-LAW MAXIM DENYING AN UNINCORPORATED ASSOCIATION THE CAPACITY TO SUE CONSTITUTES AN IMPERMISSIBLE INFRINGEMENT ON RIGHTS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS.

Petitioner Associated Students of the University of Arizona ("ASUA") first argues that the Arizona courts' decision to follow the common-law maxim and deny unincorporated associations the capacity to sue con-

flicts with an important constitutional policy articulated by this Court in *NAACP v. Button*, 371 U.S. 415 (1963) and *United Transportation Union v. State Board of Michigan*, 401 U.S. 576 (1971).

This Court has long recognized the common law which prohibits an unincorporated association, unless authorized by statute, from suing as a juridical entity. *Moffat Tunnel League v. United States*, 289 U.S. 113 (1933).

Assuming *arguendo* that unincorporated associations are entitled by the Constitution to sue as a group, Rule 23.2 of the Arizona Rules of Civil Procedure allows class actions to be brought by or against one or more members of an incorporated association as representative parties on behalf of all members of the association. In the instant case the option to sue as a class under Rule 23.2 was clearly available to ASUA; however, this course of action was not chosen.

Petitioner also contends that the decision of the Arizona courts denies ASUA equal protection of the law and cites the case entitled *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972) for support. Respondent submits that the case cited stands only for the proposition that government may not grant the use of a forum to people whose views it finds acceptable and deny use to those persons wishing to express less favorable or more controversial views. It is clear from the record that the Arizona courts' decision denying unincorporated associations the right to sue did not consider whether or not ASUA was attempting to litigate a controversial issue. The purpose for the rule that an unincorporated association cannot sue is to protect the unincorporated association and its mem-

bers. If an unincorporated association could sue, then it could be sued and the association and its individual members could be responsible for the tortious or contractual obligations of the association. This would be disastrous to ASUA as every University of Arizona student is *without choice* a member of the association, according to the current ASUA Constitution, Article 2. Only students may be members, but all students are required to belong to ASUA. Thus, ASUA's members would presumably be personally liable for claims against the association. The undesirability of this result demonstrates the wisdom of the common-law rule against suits by unincorporated associations.

II

WHETHER THE DECISION OF THE ARIZONA COURTS CONFLICTS WITH ANY CIRCUIT COURT DECISIONS.

Each case cited by Petitioner in support of his contention that the decision of the Arizona courts conflicts with several circuit court decisions is distinguishable. There is simply no conflict. The circuit court decisions are all based on Rule 17(b) of the Federal Rules of Civil Procedure. That rule provides as follows:

> (b) CAPACITY TO SUE OR BE SUED. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. *In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except* (1) *that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States,* and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C. §§ 754 and 959(a). (Emphasis added.)

The instant case was filed in state court, not federal court; the State of Arizona has not adopted Federal Rule 17(b). Absent such a rule, it is clear that the decisions Petitioner claims conflict with the Arizona courts' decisions are simply inapplicable.

III

WHETHER THE REGENTS' EXERCISE OF SUPERVISION CONSTITUTES AN UNLAWFUL DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW, AND THE LOWER COURT'S INTERPRETATION OF THE CONTRACT IS CLEARLY WRONG.

Although believing the 1937 Agreement's language to be unambiguous, the Board of Regents introduced evidence in the lower court properly concerning the construction given to the contract by ASUA and the Board of Regents as demonstrated by subsequent acts of the parties since the 1937 Agreement was executed. It is clear from the judgment entered in the lower court that this evidence was taken into consideration by the court in determining that under the terms of the 1937 Agreement, the Arizona Board of Regents of the University of Arizona has the right to maintain and exercise supervision over all funds produced through the operation of the bookstores at the Univer-

sity of Arizona. It is, of course, an elemental principle of the law of contracts that a court may consider the parties' subsequent acts as evidence of their intention at the time of contracting. *See, Crone v. Amado,* 69 Ariz. 389, 397, 214 P.2d 518, 524 (1950); *Rio Grande Oil v. Upton Oil Co.,* 33 Ariz. 474, 266 P. 3 (1928); *Corbin on Contracts,* § 558 (1960). *Pendelton v. Brown,* 26 Ariz. 604, 625, 321 P. 213 (1923), stated:

> It is elementary that courts will adopt a construction given to a contract by the parties themselves, unless such construction does violence to the express terms of the writing. *This rule is especially applicable where such interpretation has extended over a long period of time.* (Emphasis added.)

A further statement of the law applicable to this case was made by the Ninth Circuit in *Brown v. Cowden Livestock Co.,* 187 F.2d 1015, 1019 (9th Cir., 1951), applying Arizona law:

> The acts of parties under a contract, *before disputes arise,* are the best evidence of the meaning of doubtful contractual terms ... (Emphasis added.)

Applying the above law, the lower court examined the parties' past practices and concluded that based upon the past practices of the parties, the University of Arizona Board of Regents, under the 1937 Agreement, was entitled to exercise control over the expenditure of the profits of the ASUA Bookstore. The evidence demonstrating Regent management and

control of Bookstore affairs is recorded as early as 1939 and extended over a period of 30 years. It is a part of the record in this case and need not be reiterated here.

When it is necessary for the trier of fact to resort to an examination of extrinsic facts in order to interpret a contract, those findings should not be disturbed on appeal. *Holaway v. Realty Associates,* 90 Ariz. 289, 292, 367 P.2d 643, 646 (1962).

The decision of the Arizona courts held that the contract *was* ambiguous and concluded as follows:

> We have reviewed the record and there was reasonable evidence to support the trial court's determination that over the years the Board of Regents had consistently maintained supervision and ultimate control over bookstore operations, including disbursal of profits. The 1937 Agreement thus conveyed only a limited property right to ASUA. It provided a source of funds, but subject to the Board of Regents' control. *We find no deprivation of property without due process of law.* (Emphasis added.)

CONCLUSION

There can be no question that the decisions of this Court with respect to the right of groups to associate to assert a legal right does not represent a policy that would overrule this Court's decision in *Moffat Tunnel League v. United States,* 289 U.S. 113 (1933) which denies unincorporated associations the capacity to sue absent statutory authorization.

The common-law maxim adopted as the law in Arizona also does not violate the equal protection clause of the Fourteenth Amendment. There is certainly a rational basis for distinguishing between groups abiding by the laws on incorporation and groups without legal status under state law in determining whether or not ASUA has the capacity to sue in the State of Arizona.

The circuit court decisions allowing student groups to bring suit against the governing bodies of their respective schools are clearly based upon Rule 17(b) of the Federal Rules of Civil Procedure and that rule has not been adopted in Arizona. Clearly, the United States Constitution does not require that Rule 17(b) be adopted by the State of Arizona.

Finally, the Arizona court's decision that the contract in question was ambiguous and its determination that the trial court's findings of fact were reasonable should be left undisturbed by this Court.

For all of the above reasons, Respondent submits that a writ of certiorari should not issue to review the judgment and opinion of the Arizona Court of Appeals, Division Two.

RESPECTFULLY SUBMITTED,

ROBERT K. CORBIN
Attorney General

DAVID W. RONALD
Assistant Attorney General
200 State Capitol
Phoenix, Arizona 85007
Attorneys for Respondent

January 5, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-924

ASSOCIATED STUDENTS OF
THE UNIVERSITY OF ARIZONA,
for the benefit of its
members, and JOHN KROMKO,
Petitioners,
vs.
ARIZONA BOARD OF REGENTS,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January, 1979, three copies of the Brief in Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to William Joseph Risner, 100 North Stone Avenue, 910 Pioneer Plaza, Tucson, Arizona 85701,

counsel for Petitioners. I further certify that all parties required to be served have been served.

ROBERT K. CORBIN
Attorney General

DAVID W. RONALD
Assistant Attorney General
200 State Capitol
Phoenix, Arizona 85007
Attorneys for Respondent

Supreme Court, U.S.
FILED
JAN 22 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-924

ASSOCIATED STUDENTS OF
THE UNIVERSITY OF ARIZONA,
for the benefit of its
members, and JOHN KROMKO,

Petitioners,

vs.

ARIZONA BOARD OF REGENTS,

Respondent.

BRIEF IN REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

William Joseph Risner
100 North Stone Avenue
901 Pioneer Plaza
Tucson, Arizona 85701

Counsel for Petitioners

January 19, 1979

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-924

ASSOCIATED STUDENTS OF
THE UNIVERSITY OF ARIZONA,
for the benefit of its
members, and JOHN KROMKO,

Petitioners,

vs.

ARIZONA BOARD OF REGENTS,

Respondent.

BRIEF IN REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

William Joseph Risner
100 North Stone Avenue
901 Pioneer Plaza
Tucson, Arizona 85701

Counsel for Petitioners

January 19, 1979

I N D E X

Page

Reasons for Granting the Writ....

I. Respondent offers no compelling state interest to justify its infringment of petitioner's fundamental rights..... 2

II. A class action is neither appropriate nor practical..... 5

III. At issue is not only the interpretation of a contract, but the exercise of constiutionally protected liberties..... 6

Certificate of Service..... 9

TABLE OF CASES AND AUTHORITIES

Cases	Page
Associated Stud., U. of Cal. at Riverside v. Attorney General, 368 F. Supp. 11 (1973)	3
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1978)	2
First Nat. Bank of Boston v. Bellotti, 98 S. Ct. 1407 (1978)	4
N.A.A.C.P. v. Button, 371 U.S. 415 (1963)	5
Police Dept. of City of Chicago v. Mosley, 408 U.S. 92 (1972)	2
Reader v. Magma-Superior Copper Company, 101 Ariz. 115, 515 P. 2d (1973)	6
United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971)	2

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution First Amendment	2,4,8
United States Constitution Fourteenth Amendment	4

TABLE OF CASES AND AUTHORITIES-Cont'd

MISCELLANEOUS — Page

Am Jur. 2d Assoc. & Clubs § 16... 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-924

ASSOCIATED STUDENTS OF
THE UNIVERSITY OF ARIZONA,
for the benefit of its
members, and JOHN KROMKO,

Petitioners,

vs.

ARIZONA BOARD OF REGENTS,

Respondent.

BRIEF IN REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners, ASSOCIATED STUDENTS OF THE UNIVERSITY OF ARIZONA (ASUA) and JOHN KROMKO, respectfully pray that a writ of certiorari issue to review the Arizona Court of Appeals Division Two decision entered in this proceeding on February 7, 1978.

I.

RESPONDENT OFFERS NO COMPELLING STATE INTEREST TO JUSTIFY ITS INFRINGEMENT OF PETITIONER'S FUNDAMENTAL RIGHTS.

Petitioner Associated Students of the University of Arizona (ASUA), contends that the lower court's rufusal to allowing ASUA to litigate in the courts of Arizona violates its First Amendment right of associational access to the courts, United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971), and right to petition, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), and denies ASUA equal protection of the law, Police Dept. of City of Chicago v. Mosley, 408 U.S. 92 (1972).

Respondent justifies such an intrusion by explaining that the rule prohibiting unincorporated groups from

sueing or being sued protects those associations and its individual members from liability for the tortious or contractual obligations of the association.

The Regents' concern for limiting student liability rings hollow when considered in light of their long-standing opposition to and prevention of incorporation by ASUA. Furthermore, respondent fails to document this apprehension which is in fact contradicted by the experience of unincorporated associations, many identical in composition to ASUA, which have litigated in Federal and many state courts. E.g., Associated Stud. of U. of Cal. at Riverside v. Attorney Gen., 368 F. Supp. 11 (1973). Finally, respondents insinuation that an uninvolved University of Arizona student, who is an ASUA member only because he or she must be,

could be held responsible for an ASUA debt is simply wrong. Such an assertion confuses the law of partnership with the principles of agency which govern the present situation and which would impose liability only upon personal ratification of the act. Am Jur. 2. Assoc. and Clubs § 16.

A fundamental right may be denied only upon a showing that a "subordinating interest is compelling." First Natl. Bank of Boston v. Bellotti, 98 S. Ct. 1407 (1978). The Regents proffer an interest of doubtful validity to justify the subjugation of rights guaranteed ASUA by the First and Fourteenth Amendments. A writ of certiorari should issue to scrutinize the situation.

II.

A CLASS ACTION IS NEITHER APPROPRIATE NOR PRACTICAL.

Respondent contends that if an unincorporated association is constitutionally entitled to sue as a group, a class action is the appropriate vehicle.

Initially, it need be noted that an organization's right of access to the courts as articulated by NAACP v. Button, 371 U.S. 415 (1963) and progeny, makes no such condition. Secondly, ASUA, the organization, is a party to the contract underlying this litigation, and therefore should be allowed to vindicate itself as such.

Additionally, forcing ASUA's approximately 35,000 members to resort to class actions to litigate the organization's claims impractical. Recent Arizona decisions are consistent with the Federal trend in limiting this court of action. See, Reader v.

Magma-Superior Copper Company, 110 Ariz. 115, 515 P. 2d 860 (1973). Furthermore, ASUA is a political organization comprised of university students, and thus its membership is ever transient. Class actions would pose suffocating logistical as well as financial problems acompanied by constant bickering regarding representation of the class.

Clearly, forced reliance on class actions would be tantamount to no legal redress and as such, is not a viable alternative.

III.

AT ISSUE IS NOT ONLY THE INTERPRETATION OF A CONTRACT, BUT THE EXERCISE OF CONSTITUTIONALLY PROTECTED LIBERTIES.

Finally, the Respondent opposes the issuance of a writ of certiorari on the grounds that the trial court's interpretation of the contract should

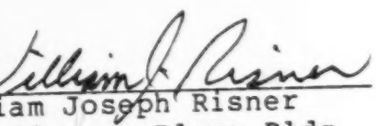
be deferred to by a reviewing tribunal. This argument ignores the practical implications of this petition. Indeed, ASUA attributes error to the interpretation of the contract by the lower courts, and realizes that this body has the perrogative of denying this writ, deciding this contract question, or remanding it for further consideration or factfinding.

However, this petition involves more than the determination of the present dispute. At issue is the right of ASUA or any unicorporated association to litigate in the Courts of Arizona. If the decision below is left standing, ASUA is left without any practical avenue for neutral arbitration of its affairs. In that case, the Regents could the next day declare the contract null and void, and leave ASUA without a state remedy, a course of

conduct not so preposterous in light of their present usurpation of the contract's profits.

Certainly, the instant litigation involves the interpretation of a contract, but more importantly, lies the right of an organization to enjoy its First Amendment rights of expression and petition, and its ability to enjoy and use its property as it sees fit. For these reasons a writ of certiorari is appropriate and should issue.

RESPECTFULLY SUBMITTED,



William Joseph Risner
901, Pioneer Plaza Bldg.
100 N. Stone Avenue
Tucson, Arizona 85701

Counsel for Petitioner

January 19, 1979

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-924

ASSOCIATED STUDENTS OF
THE UNIVERSITY OF ARIZONA,
for the benefit of its
members, and JOHN KROMKO,

Petitioners,

vs.

ARIZONA BOARD OF REGENTS,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 1979, three copies of the Reply to the Brief in Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to the Hon.

Robert K. Corbin, Attorney General, 200 State Capitol Building, Phoenix, Arizona 85007, attn: David W. Ronald, Counsel for Respondent. I further certify that all parties required to be served have been served.

William Joseph Risner
100 North Stone Avenue
901 Pioneer Plaza
Tucson, Arizona 85701

Counsel for Petitioners

January 19, 1979